85-230

No. _____

Supreme Court, U.S.
FILED
AUG 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

EMERY AUTHIER, JR.,

Petitioner,

-vs-

FRED M. GINSBERG,
AMERICAN STEEL CORPORATION
and NATIONAL STEEL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

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51 pp

QUESTION PRESENTED

DOES ERISA (29 U.S.C. § 1102 *ET SEQ*) PREEMPT AN ACTION BY AN EMPLOYEE AGAINST HIS EMPLOYER BASED ON A STATE COMMON LAW TORT FOR A RETALIATORY DISCHARGE WHILE THE EMPLOYEE WAS FULFILLING HIS STATUTORY DUTIES AS A "FIDUCIARY" IN A COMPANY PENSION PLAN AS REQUIRED BY LAW (*N.L.R.B.* v. *AMAX COAL COMPANY*, 453 U.S. 322 (1981)), AND NO LEGAL REMEDY WAS AVAILABLE TO THE EMPLOYEE UNDER ERISA?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Sixth Circuit Court of Appeals entered in this case on May 9, 1985.

OPINIONS BELOW

This Petition seeks review of a divided decision of the Sixth Circuit Court of Appeals as set forth in Appendix A *infra* (A-1).

JURISDICTION

The decision of the Court below was issued on March 26, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. § 12 (54)(1).

STATUTE INVOKED

ERISA, 29 U.S.C., provides in pertinent part:

Section 1102. Definitions.

For purposes of this subchapter:

"(2) The terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program —

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits for the plan."

* * *

"(5) The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."

"(6) The term 'employee' means any individual employed by an employer."

"(7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

* * *

"(16)(A) The term 'administrator' means —

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term 'plan sponsor' means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or

other similar group of representatives of the parties who establish or maintain the plan."

* * *

"(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title."

Section 1102. Establishment of plan

"(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan."

Section 1104. Fiduciary duties

"(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall dis-

charge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:
  (i) providing benefits to participants and their beneficiaries; and
  (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiarity with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter."

Section 1109. Liability for breach of fiduciary duty

"(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each

such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the Plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title."

"(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be fiduciary."

Section 1140. Interference with protected rights

"It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section."

STATEMENT OF THE CASE

By a two-to-one vote, the Sixth Circuit Court of Appeals held that ERISA preempts a suit brought under a State tort action by an employee against his employer for retaliatory discharge as a result of exercising his rights as an administrator of his employer's pension and profit sharing plan even though his right to be an administrator of the plan was derived entirely from his status as Vice President-Controller of the corporation.

On February 23, 1981, the Petitioner, Emery Authier, Jr., filed a Complaint in the Wayne County, Michigan Circuit Court alleging that the Respondents, Fred M. Ginsberg along with the Corporate Respondents, National Steel Corporation and American Steel Corporation individually, collectively and wrongfully terminated Mr. Authier's employment at the American Steel Corporation.

Mr. Authier in his Complaint further alleged that the Defendants breached an employment contract and discharged him in violation of Michigan and Federal Public Policy.

On March 17, 1981, the Respondents Fred M. Ginsberg, American Steel Corporation and National Steel Corporation, joined in a Motion to remove the cause of action to the United States District Court, Eastern District of Michigan, Southern Division, claiming that the United States District had original jurisdiction under 29 U.S.C. § 1332(a)(1)(B).

On February 16, 1983, a jury was selected to hear the issues with the exception of a claim by the Petitioner, relating to ERISA. Parties by Stipulation agreed that the court, sitting as the trier of fact, would resolve that contested issue.

On March 8, 1983, after Petitioner's counsel closed its proofs, the Respondents made a Motion for a Directed Verdict on all the claims alleged in Mr. Authier's Complaint.

The court held that Petitioner, Emery Authier, did not state a cause of action under ERISA and thus the court dismissed Mr. Authier's claim under ERISA, opining that it was outside the scope of ERISA as well as its enforcement provisions (*see* Appendix B, Trial Court's Opinion).

The court, however, further held that Mr. Authier's discharge gave rise to a common law cause of action in Michigan for the wrongful discharge in violation of Michigan Public Policy.

On March 21, 1983, after trial on the merits, the jury rendered a verdict in favor of Plaintiff, Emery Authier, Jr., as to Count II of Plaintiff's Complaint.

On April 8, 1983, the Respondents' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial was denied by the United States District Judge, Julian Abele Cook, Jr., for the reasons as set forth in his previous Opinion (Appendix B).

A. Facts

Emery Authier, Jr., was hired by American Steel Corporation (hereinafter referred to as American) as a controller, in November of 1968. In 1972, the stockholders of American elected Mr. Authier to its board of directors. The board of directors then elected Mr. Authier, Vice-President of finance and the assistant secretary.

In 1973, National Steel Corporation (hereinafter referred to as National) acquired American in 1973. With the sale of American's stock and assets to National, Mr. Authier's title was changed to Vice-President-Controller of American.

In 1977, Mr. Rudd, in charge of all of National's Pension Plan in Pittsburgh, informed Mr. Authier that he was going to be secretary of the administrative committee. The other members of the administrative committee for the American Plan were George Angevine, who was the general legal counsel of National, and Bill Rust, the Vice-President-financing at National.

On January 1, 1978, the Board of Directors of American appointed Mr. Authier, Mr. Rust and Mr. Angevine as Administrative Committee of the Profit Sharing Plan.

The present controversy arose when National decided to bring the American Steel salaried employees into National's retirement program effective January 1, 1979.

On January 28, 1980, Emery Authier drew up the funding letter for the year 1979 and sent the letter to his co-members of the administrative committee, Mr. Rust and Mr. Angevine, with his signature already on it. This letter, which was signed by Mr. Angevine and Mr. Rust, stated in effect that as of January 1, 1980, all American Steel Corporation salaried employees will be covered for retirement benefits under the National Steel Corporation Retirement Program and that termination of the American salaried employees' profit sharing plan and trust agreement would take place along with the distribution of the assets when final payment is made to the trustee on September 15, 1980.

On October 6, 1980, Mr. Authier as an administrator prepared and distributed a copy of a letter to the participants of the salaried group. This letter recommended that the Law Firm of Thorpe, Reed and Armstrong, who originally drew up the amended profit and pension plan for American, be the law firm to submit the plan to the IRS if a decision is made to terminate and distribute.

As a result of this letter, the Respondent, and President of American, Fred M. Ginsberg, requested that Mr. Authier take an early vacation and on October 20, 1980, suspended Mr. Authier without pay, based on the letter of October 6 regarding the American Steel Profit Sharing Plan.

On November 22, 1980, Mr. Authier was ordered to resign by Mr. Ginsberg whereupon, based upon Mr. Authier's refusal to resign, he was discharged from his employment at American.

From October 8, 1980, when Mr. Authier was first suspended, until November 22, 1980, Mr. Authier had not been permitted to work at American.

B. The Sixth Circuit Court Of Appeals' Decision

1. MAJORITY OPINION

On March 26, 1985, The United States Court of Appeals for the Sixth Circuit reversed the United States District Court Trial Judge. Relying on what it asserted was Congress' explicit policy statement regarding ERISA, the majority held that although Mr. Authier had asserted a cause of action under Michigan Law, it was preempted by ERISA. (Appendix A, A-1).

The majority also applied preemption standards developed in *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983) and other decisions of the Court which focused primarily on the relation between State Law and Section 1144(A) of ERISA, 29 U.S.C. §§ 1001-1461.

In this context, the Court ruled that ERISA created the public policy element of the Common Law Action even though the majority recognized that the Michigan Cause of Action regulates employment relationships and not pension plans. (Appendix A, A-7,8).

2. DISSENTING OPINION

The dissenting Judge, The Honorable George Edwards, rejected this analysis. He reasoned that Mr. Authier under the facts plead and proved a cause of action under Michigan Law for wrongful discharge in violation of public policy, and that the State courts would protect the integrity of ERISA as part of its own public policy. Finally, the dissent concluded that ERISA did not preempt the Michigan Cause of Action because ERISA does not expressly create a Federal Cause of Action for wrongful discharge of a fiduciary. (Appendix A, A-12).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT COURT OF APPEALS' DECISION ERRONEOUSLY CONFUSES TWO DISCRETE PRINCIPLES OF PREEMPTION LAW.

The Sixth Circuit Court of Appeals asserted that its conclusion actually is consistent with this Court's decisions in *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983) and *Allessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). It is not. The two convergent lines of authority the Court below relied upon to justify the reversal of the Petitioner's stated cause of action for retaliatory discharge are clearly distinguishable in fact and principle from this case.

First, its extensive citation in reliance on *Allessi* v. *Raybestos-Manhattan, Inc., supra,* is erroneous. In *Allessi,* a State statute was declared preempted by ERISA, because it directly eliminated one method of calculating pension benefits-integration that Congress intended ERISA to preserve, 451 U.S. at 514-517. Methods of calculating

and paying pension benefits at issue in *Allessi* are explicitly regulated by ERISA.

Allessi is not analogous to the facts in the instant case, for here the underlying issue involves whether or not a State's common law and public policy protects its employees' rights to exercise fiduciary duties as required in their course of employment.

Secondly, the Court below has suggested that this Court's decision in *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983) has abolished any State interest in the protection of its citizenry when State law even tangentially has any reference to ERISA. (Appendix A, A-6).

This suggestion implies, despite rejection by this Court, that ERISA intended to eliminate a State's interest in providing protection for its employees beyond that afforded by Federal Law.

This Court's decision in *Shaw* v. *Delta Airlines, Inc., supra,* rejects this implication, for in *Shaw* this Court, in defining "relates to," held that a law relates to an employee benefit plan within the meaning of ERISA only if that law has a connection with the reference to such plan and further recognizes limits to the reach of the phrase "relates to," stating:

> "That some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw* v. *Delta Airlines, Inc., supra* at p. 503.

Michigan is not the only State which has recognized certain fundamental State interest which cannot be preempted. *AT&T* v. *Merry,* 592 F. 2d 118 (C.A. 2, 1979) (alimony and support payments); *Operating Engineers Local 428 Pension Trust Fund* v. *Zamborsky,* 605 F. 2d 146

(C.A. 9, 1981) (spousal maintenance payments); *Carpenters Pension Trust* v. *Kronschnabel*, 632 F. 2d 745 (C.A. 9, 1980) *cert denied*, 453 U.S. 922, 101 S. Ct. 3159, 69 L. Ed. 2d 1004 (1981) (division of community property).

The courts have also held that ERISA does not preempt a State's preference statute since it is a fundamental State interest to protect creditors and shareholders of an insolvent corporation. *See Deiches* v. *Carpenters Health & Welfare Fund of Philadelphia*, 572 F. Supp. 766 (D.C. N.J. 1983).

The court in *Deiches* held that the law did not affect the internal workings of rules and regulations of the ERISA plan and that the State law was one of general application. Relying on *New York Telephone* v. *New York State Department of Labor*, 440 U.S. 519, 59 L. Ed. 2d 553 (1979), the court held that a State law requiring payment of unemployment benefits to striking employees was not preempted by Federal Labor laws since it was a law of general application.

Lastly, in *Providence* v. *Valley Clerk's Trust Fund*, 509 F. Supp. 388 (D.C. Ca. 1981), the court held that it was a matter of important State concern that the common law fraud was not preempted by ERISA since it did not directly regulate the administration of the Plan. The court here followed the dictates of the U.S. Supreme Court's rulings in *New York Telephone* v. *New York State Department of Labor, supra*, and *Linn* v. *Plant Guard Workers*, 383 U.S. 53 (1966), where the court held that State libel laws are not preempted by Federal Labor law.

II.

THERE IS NO ERISA PROVISION WHICH AFFORDS A REMEDY FOR THE WRONGFUL DISCHARGE OF AN EMPLOYEE EXERCISING HIS FIDUCIARY DUTIES AS AN ADMINISTRATOR FOR A COMPANY'S PENSION PLAN.

The Court of Appeals' decision, that Congress has already provided a remedy for the type of wrong which the Petitioner's State claim embraces in 29 U.S.C. § 1140, is misplaced.

In 29 U.S.C. § 1140 ERISA states that:

> "It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section."

The Petitioner's claim does not address the same type of wrong prohibited in Section 1140, for while ERISA imposes strict civil and criminal liability on the fiduciary, it gives no specific remedy to him for retaliatory discharge from his employment for fulfilling those statutory

responsibilities. Thus the fact that ERISA did not provide a remedy for the wrongful discharge of an administrator from employment for exercising a right under his fiduciary duties ERISA does not preclude an individual from seeking remedy under State Law against the wrongdoer.

The legislative history in ERISA clearly reveals that Congress had no intention of forbidding the States from providing State Law remedies by those who are required to exercise their fiduciary duties. This silence takes on the greatest significance in light of Congress' failure to provide any federal remedy for persons injured by such tortious conduct.

This Court, in *Silkwood* v. *Kerr McGee Corporation*, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984), held that preemption should not be judged on the basis that the Federal government has so completely occupied the field that State remedies are foreclosed, but on whether there is an irreconcilable conflict between the Federal and State standards or whether the imposition of a State standard in a damage suit would frustrate the objective of the Federal law. This Court, in reversing the lower court, stated that an award of punitive damages is not preempted by Federal law unless such is expressly enunciated. In *Silkwood*, Plaintiff's cause of action was reinstated since the Defendant was unable to sustain the burden imposed upon it by the court to show that Congress intended to preclude such remedies.

In conclusion, what makes the Court of Appeals' reading of ERISA particularly untenable is that it suggests a remedy where clearly none is available. ERISA does not contain any substantive remedy for an employee being discharged in exercising certain fiduciary duties under a pension plan; therefore, States must be free to provide for their workers' welfare in this area.

III.

THIS CASE PRESENTS IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS.

The Court of Appeals' holding carries with it far-reaching implications affecting fundamental State interests and protection of their employees in the work place; for the importance of this issue relates to the integrity of pension funds.

If the employer is allowed to independently coerce its employees who are vested with fiduciary powers by threatening to discharge them from their employment if decisions are not favorable to the company, the administering of pension plans for the beneficiaries will be jeopardized.

The Court of Appeals' decision frustrates significant pension fund policy which has been addressed by this Court, most recently in *N.L.R.B.* v. *Amax Coal Company*, 453 U.S. 322 (1981), which recognized the growing impact of benefit plans on the nation's economy.

The U.S. Supreme Court spoke to the standard of fiduciary conduct regarding ERISA, and reaffirmed the fiduciary's obligations to adhere to the interest of the participants of the plan without any regard to the interest or desire of one's employer or party, stating:

> "Under principles of equity, a trustee bears an unwaivering duty of complete loyalty to the beneficiaries of the trust, to the exclusion of all other parties. Restatement (2d) of Trust, 170 (1); 2 Scott on Trust, Section 170. To deter the trustee from all temptation to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' *Meinhard* v. *Salmon*, 249 N.W.

> 45, 464, 164 N.E. 545, 546 (Cardoza, J.). A fiduciary cannot contend that, 'although he had conflicting interest, he served his masters equally well or that his primary loyalty was not weakened by the pull of the secondary one.' *Woods* v. *City National Bank & Trust Co.*, 312 U.S. 262, 296, 85 L. Ed. 820, 61 S. Ct. 493." *N.L.R.B.*, at 329, 330.

The Court of Appeals, rather than insuring the protection of pension funds through the uncompromising exercise of a fiduciary in carrying out its duties, an essential aim endorsed by Congress and this Court, has instead created an environment of uncertainty as to whose best interest the pension plans are being administered for, the company's or the participant's.

In sum, the lower court's decision impermissibly and seriously intrudes and undermines important policies embodied therein; for it allows and permits abuses that Congress had intended to avert.

CONCLUSION

For these reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated:
August 8, 1985

APPENDICES

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APPENDIX A

OPINION

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

(United States Court of Appeals for the Sixth Circuit)

(Decided and Filed March 26, 1985)

(EMERY AUTHIER, JR., Plaintiff-Appellee, v. FRED M. GINSBERG, AMERICAN STEEL CORPORATION, a Michigan corporation and NATIONAL STEEL CORPORATION, a foreign corporation, jointly and severally, Defendants-Appellants — No. 83-1674; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: EDWARDS* and MARTIN, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

CELEBREZZE, Senior Circuit Judge, delivered the opinion of the Court, in which MARTIN, Circuit Judge, joined. EDWARDS, Circuit Judge [p. A-12] delivered a separate opinion, concurring in part and dissenting in part.

CELEBREZZE, Senior Circuit Judge.

Defendants-appellants, American Steel Corporation (American), its wholly owned subsidiary, National Steel Corporation (National), and Fred Ginsberg, American's Chairman, appeal from a jury verdict in favor of plaintiff-appellant Emery Authier, Jr. The defendants contend that the district court submitted improperly the case to

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* Honorable George Edwards took senior status January 15, 1985.

the jury because Authier's complaint failed to state a cause of action under Michigan law and because, in any event, the action was preempted by Section 1144(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1982). We hold that although Authier stated a cause of action under Michigan law, such an action is preempted by ERISA. Accordingly, we vacate the jury verdict.

Authier was employed as an accountant by American from November of 1968 until his discharge in November of 1980. In January, 1978, Authier was appointed as an administrator of American's profit sharing plan, along with George Angevine, National's General Counsel, and Bull [*sic*] Rust, National's Vice President-Finance. Since American's profit sharing plan was subject to ERISA regulation, *see* 29 U.S.C. § 1003(a) (1982), Authier and the other administrators become subject to ERISA's fiduciary duties, *see* 29 U.S.C. § 1104 (1982).

In the fall of 1979, a corporate decision was made to terminate American's profit sharing plan and bring the participants within National's pension plan. During the termination process, Authier spoke to a partner in the law firm in charge of the termination of the plan. The partner informed Authier that an associate believed that a few problems existed with the plan. The next day Authier contacted the associate who denied making the statements attributed to him and assured Authier that nothing was wrong with the plan. Authier then contacted the firm which originally drafted the profit sharing plan; a partner at the firm told Authier that the termination should occur without difficulty.

Believing he was obligated by ERISA to inform his co-fiduciaries and the plan's participants of potential problems, Authier drafted a letter in which he related his concerns. The letter recommended, among other things,

that the law firm which drafted the pension plan be placed in charge of its termination. This letter was sent to Rust, Angevine, and the plan's participants. Subsequently, according to the defendants, since Authier had been instructed previously to clear all mail of a non-routine nature with Ginsberg and since he failed to obtain Ginsberg's approval prior to sending the letter, Authier was discharged from his positions at American. Authier then brought suit, arguing that his discharge contravened Michigan public policy.

Generally, under Michigan law, an employee can be discharged for any reason. *E.g.*, *Lynas* v. *Maxwell Farms*, 279 Mich. 684, 687, 273 N.W. 315, 316 (1937). The Michigan courts, however, recognize an exception to this general rule; an employee may not be discharged in violation of a "clearly articulated, well-accepted public policy." *Clifford* v. *Cactus Drilling Corp.*, 419 Mich. 356, __, 353 N.W.2d 469, 474 (1984). In order to invoke this public policy exception, a plaintiff must establish that he was engaged in a protected activity, that he was discharged, and that his discharge was due to performing the protected activity. *Id.* at __, 353 N.W.2d at 474. In this case, the jury found specifically that Authier was discharged for fulfilling his duties under ERISA. Thus, as an initial matter, the issue before this court is whether a fiduciary's compliance with his duties under ERISA is a protected activity.

The Michigan Supreme Court has noted that an employee's compliance with a statutory directive may, under certain circumstances, be a protected activity. *Clifford*, 419 Mich. at __, 353 N.W.2d at 473. For example, in *Trombetta* v. *Detroit, Toledo & Irontown Railroad Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978), the Michigan Court of Appeals held that an employer could not, consistent with public policy, discharge an employee for

refusing to falsify state required pollution control reports.[1] The *Trombetta* court reasoned that "[i]t is without question that the public policy of this state does not condone attempts to violate its duly enacted laws." *Id.* at 495, 265 N.W.2d at 388. *Accord Goins* v. *Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983) (Michigan public policy violated by firing an employee for filing a worker's compensation report). In addition to an employee's compliance with the statutory mandate, however, the statutory scheme must create a clearly-mandated public policy.[2] *E.g.*, *Suchodolski* v. *Michigan Consolidated Gas Co.*, 412 Mich. 692, 696, 316 N.W.2d 710, 712 (1982) (per curiam).

In order to protect pension plan participants and beneficiaries, Congress set up a comprehensive statutory scheme which established "standards of conduct, responsibility, and obligation for fiduciaries." 29 U.S.C. § 1001 (b) (1982). An ERISA fiduciary is obligated to perform his duties with the "skill, prudence, and diligence" of a reasonable man and act "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1)(b) (1982). Moreover, fiduciaries are personally liable for breaches

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[1] The Michigan Supreme Court has affirmed the holding of *Trombetta*. *Clifford* v. *Cactus Drilling Corp.*, 419 Mich. 356, ___, 353 N.W.2d 469, 473 (1984).

[2] We note that the Michigan courts have not yet applied the retaliatory discharge exception to violations of federal public policy. Nevertheless, in *Suchodolski* v. *Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982) (per curiam), the Michigan Supreme Court cited approvingly a United States District Court case which held that a discharge for refusing to fix prices in violation of the Sherman Act violated Pennsylvania public policy, *McNulty* v. *Borden, Inc.*, 474 F. Supp. 1111, 1119 (E.D. Pa. 1979). *Suchodolski*, 472 Mich. at 695 n.3, 316 N.W.2d at 712 n.3. We do not believe that a principled distinction can be drawn between discharges in violation of a state public policy and those which contravene a public policy created by a federal statute. Thus, we conclude that the Michigan courts would recognize a cause of action for a discharge which violated an important and clearly-mandated federal public policy.

of their duties under ERISA, 29 U.S.C. § 1109(a) (1982), and, under some circumstances, for breaches by their co-fiduciaries, 29 U.S.C. § 1105 (1982). We believe that this explicit Congressional policy statement coupled with ERISA's detailed statutory provisions rises to the level of an important and clearly-articulated public policy under Michigan law.[3] Thus, the district court held correctly that Authier asserted a cause of action under Michigan law, and, consequently, appropriately considered whether the action was preempted by ERISA.

ERISA preempts expressly "any and all State laws[4] insofar as they may now or hereafter *relate to* any employee

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[3] Appellants have contended throughout these proceedings that this action concerns merely a corporate management dispute, which does not implicate Michigan public policy. *See Suchodolski* v. *Michigan Consol. Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982) (per curiam). In our view, since Congress has declared explicitly that the public policy of the United States is to establish "standards of conduct, responsibility, and obligation for fiduciaries," 29 U.S.C. § 1001(b) (1982), and has enacted specific statutes to carry out this policy, Authier's discharge for complying allegedly with ERISA cannot be categorized as merely a corporate management dispute.

[4] "State law" is defined expansively to include "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1) (1982). Similarly, the term "State" subsumes "a State, any political subdivisions thereof, . . . which purports to regulate, directly or indirectly, the *terms and conditions* of employee benefit plans." 29 U.S.C. § 1144(c)(2) (1982) (emphasis added).

Ostensibly, the language "terms and conditions" in Section 1144(c)(2) could be construed narrowly to limit the preemptive effect of Section 1144(a); only state laws which impinge upon the specific provisions of ERISA would be preempted. *See Lane* v. *Goren*, 743 F.2d 1337, 1340 (9th Cir. 1984) (court indicates in dicta that terms and conditions language could be construed narrowly to limit preemptive effect of ERISA). This interpretation of Section 1144(c)(2), however, would be contrary to the legislative history of ERISA. Congress rejected explicitly a proposed preemption provision which reached only specific subjects covered by ERISA in favor of the current broad language of Section 1144(a). *See Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, __, 103 S. Ct. 2890, 2900-01 & nn. 13, 19 & 20 (1983). Further, if

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benefit plan."[5] 29 U.S.C. § 1144(a) (1982) (emphasis added). The Supreme Court has on two occasions considered the breadth of preemption under ERISA. In *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court interpreted Section 1144(a) broadly to preempt state laws which relate both directly and indirectly to ERISA. *Id.* at 525. Thus, the Court held that even though the New Jersey law in question regulated apparently workers' compensation awards and not pension plans, it still fell within the preemptive sphere of Section 1144(a). *Id.* at 524. Further, the Court noted that Congress intended to make the regulation of pension plans solely a federal concern. *Id.* at 523. More recently, the Supreme Court reaffirmed and expanded upon the *Alessi* holding. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983). The Court in *Shaw* reasoned that Congress used "relate to" in its broadest sense, *id.* at __, 103 S.Ct. at 2900, and, therefore, if a state law has "a connection with or reference to" an ERISA pension plan, it is preempted, *id.*[6] In the present case, we must determine whether a state common-law cause of action for dis-

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Congress intended for Section 1144(a) to have a limited preemptive effect, there would have been no need to exempt from preemption state criminal laws of general applicability. *See* 29 U.S.C. § 1144(b)(4) (1982). Nevertheless, because we believe that a state law which governs the remedies available to an ERISA fiduciary discharged for complying with ERISA regulates, even under a narrow interpretation, the "terms and conditions" of a pension plan, we need not decide what limiting effect, if any, should be given to this phrase.

[5] This "virtually unique" preemption provision was intended to create a body of federal substantive law regulating pension plans. *Franchise Tax Bd. of the State of Cal.* v. *Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, __, 103 S. Ct. 2841, 2854 n.26 (1983).

[6] The Supreme Court in *Shaw* recognized that some state actions may be "too tenuous, remote, or peripheral" to warrant preemption.

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charge in violation of public policy based on a fiduciary's alleged compliance with ERISA has a connection with or reference to an employee benefit plan.[7]

Although Authier's claim is predicated technically upon the Michigan common-law cause of action for discharge in contravention of public policy, we believe that, as applied in this case, the action relates to an ERISA pension plan. Authier's action hinges upon his assertion that he was terminated for fulfilling his obligations under

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Shaw v. *Delta Air Lines, Inc.*, 463 U.S. 85, __, 103 S. Ct. 2880, 2901 n.21 (1983). The Court cited, without explicitly approving, *American Tel. & Tel. Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979). In *Merry*, the Second Circuit held that an action to garnish a spouse's income to satisfy a support obligation was not preempted by ERISA. The court noted that the garnishment action dealt with the "'ancient family law right of maintenance,'" *id.* at 122 (quoting *Cartledge* v. *Miller*, 457 F. Supp. 1146, 1154 (S.D.N.Y. 1978)), and that the regulation of domestic affairs has long been the province of state courts, *Merry*, 592 F.2d at 122. Hence, the court reasoned that Congress did not intend to preempt this area. *Accord Savings & Profit Sharing Fund of Sears Employees* v. *Gago*, 717 F.2d 1038, 1040 (7th Cir. 1983); *Bowen* v. *Bowen*, 715 F.2d 559, 560 (11th Cir. 1983) (per curiam); *Operating Engineers' Local #428 Pension Trust Fund* v. *Zamborsky*, 650 F.2d 196, 198-99 (9th Cir. 1981). The Second Circuit, however, has emphasized the narrowness of the remote and peripheral exception. *E.g.*, *Stone & Webster Eng'g Corp.* v. *Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd*, __ U.S. __, 103 S. Ct. 3564 (1983).

In contrast, a cause of action for discharge in violation of public policy is not recognized in every state, *see infra* note 10, and employer-employee relations have not been solely a concern of the states, *e.g.*, 29 U.S.C. § 141-187 (1982) (Labor-Management Relations Act); 29 U.S.C. §§ 201-219 (1982) (Fair Labor Standards Act); 29 U.S.C. §§ 651-678 (1982) (Occupational Safety and Health Act). Also unlike *Merry* which involved a basic state police power, *i.e.*, the state control of domestic relations, this appeal concerns the remedies available to a trustee of an ERISA pension plan who is terminated for performing his duties under ERISA. Therefore, in our view, this case does not fall within the peripheral and remote exception.

[7] The district court, without having the benefit of the Supreme Court's decision in *Shaw*, interpreted *Alessi* as addressing only "the specific issue before it." After the Court's decision in *Shaw*, the district court's narrow interpretation of *Alessi* is untenable.

ERISA. More importantly, ERISA created the public policy element of the common-law action. In our view, even though the Michigan cause of action regulates ostensibly employment relationships and not pension plans, preemption is not precluded in this specific application. *See Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1983). The Supreme Court has noted explicitly that the crucial inquiry is not the purpose of the action; rather, its relation to an ERISA pension plan is determinative. *Id.* Thus, we conclude that since ERISA created a substantive element of the Michigan action and since the action turns upon a fiduciary's duties under ERISA, Authier's cause of action is related to ERISA within the meaning of Section 1144(a) and, accordingly, is expressly exempted.[8]

This result is consistent with Congress' intent in enacting ERISA to protect beneficiaries and participants "by providing for appropriate *remedies*, sanctions, and

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[8] The breadth of the preemptive effect of Section 1144(a) is evidenced by the exemption for criminal laws of general applicability. 29 U.S.C. § 1144(b)(4) (1982), and by Congress' refusal to enact a proposed preemption statute which preempted only specific subjects, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, __, 103 S. Ct. 2890, 2900-01 & nn. 18, 19 & 20 (1983). *See also Champion Int'l Corp.* v. *Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984) (broad preemption to prevent conflicting and inconsistent state regulation); *American Progressive Life & Health Ins. Co. of New York* v. *Corcoran*, 715 F.2d 784, 786 (2d Cir. 1983) (sweeping preemptive effect); *Hotel & Restaurant Employees & Bartenders Int'l Union Local 54* v. *Danziger*, 709 F.2d 815, 830 (3rd Cir. 1983) (preemption as broad as "relate to" language), *vacated on other grounds*, __ U.S. __, 104 S. Ct. 3179 (1984); *Stone & Webster Eng'g Corp.* v. *Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982) (Section 1144(a) clearly eliminates the threat of conflicting or inconsistent state laws), *aff'd*, __ U.S. __, 103 S. Ct. 3564 (1983); *Kapuscinski* v. *Plan Adm'r (The Pension Plan-General Motors Corp. & the Int'l Union, UAW)*, 658 F.2d 427, 430 (6th Cir. 1981) (discussing *Alessi*); *General Motors Corp.* v. *Buha*, 623 F.2d 455, 459 (6th Cir. 1980) (preemption central to ERISA); *California Hosp. Ass'n* v. *Henning*, 569 F. Supp. 1544, 1546-1547 (C.D. Cal. 1983) (most sweeping preemption statute ever enacted); *Tolson* v. *Retirement Comm. of Briggs & Stratton Retirement Plan*, 566 F. Supp. 1503, 1504 (E.D. Wis. 1983) (discussing *Shaw*).

ready access to the Federal courts." 29 U.S.C. § 1001(b) (1982) (emphasis added). Broad enforcement provisions effectuate this policy. Civil actions may be brought by any "participant, beneficiary, or *fiduciary* . . . to enjoin any act or practice which violates any provision of [ERISA]," 29 U.S.C. § 1132(a) (1982) (emphasis added), and by a participant or beneficiary whose rights under ERISA are interfered with, 29 U.S.C. § 1140 (1982);[9] *see Crouch* v. *Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, 810 (10th Cir. 1984) (Section 1140 creates a retaliatory action similar to the civil rights laws); *Kross* v. *Western Electric Co., Inc.*, 701 F.2d 1238, 1241-43 (7th Cir. 1983) (Section 1140 to be liberally construed); *West* v. *Butler*, 621 F.2d 240, 243-44 (6th Cir. 1980) (Section 1140 "may be enforced by civil actions"). Similarly, criminal sanctions are available for coercive interference with a beneficiary's or participant's rights, 29 U.S.C. § 1141 (1982); *see West* v. *Butler*, 621 F.2d 240, 243-44 (6th Cir. 1980) (enforcement of Section 1141 exclusive province of

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[9] While Section 1132(a) provides that any "participant, beneficiary, or *fiduciary*" may bring an action to enforce ERISA, 29 U.S.C. § 1132(a) (1982) (emphasis added), Section 1140 only provides civil actions for a "participant or beneficiary," 29 U.S.C. § 1140 (1982). By including fiduciaries in Section 1132(a) but not in Section 1140, Congress may have intended to limit the remedies available to fiduciaries.

Nevertheless, assuming that Ginsberg was an ERISA fiduciary, *see* 29 U.S.C. § 1002(21)(a) (1982) (person a fiduciary to the extent exercises control over a pension plan); *Leigh* v. *Engle*, 727 F.2d 113, 133-35 (7th Cir. 1984) (corporate officer a fiduciary to the extent he controls selection or termination of fiduciaries); *Shaw* v. *International Ass'n of Machinists & Aerospace Worker's Pension Plan*, 563 F. Supp. 653, 657 (C.D. Cal. 1983) (corporate officials fiduciaries to the extent they hire and fire trustees); *Fruend* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 640 (W.D. Wis. 1979) (company officials fiduciaries to the extent they have discretionary authority); 29 C.F.R. § 2509. 75-8 (D-4) (1984), Authier may have been able to assert an action against Ginsberg under 29 U.S.C. § 1109(a) (1984) (liability of fiduciary for breach of duty) for discharging him wrongfully. However, since this issue was not raised in the pleadings or in the parties' briefs, we do not address this question.

the Attorney General), and for willful violations of the reporting and disclosure provisions, 29 U.S.C. § 1131 (1982). Moreover, the Secretary of Labor is given express investigative and enforcement powers. 29 U.S.C. § 1132 (a)(2) & 1134 (1982). Such a comprehensive enforcement scheme is indicative of a Congressional intent to make enforcement of ERISA solely a federal concern. *See Franchise Tax Board of the State of California* v. *Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, __, 103 S. Ct. 2841, 2854 (1983) (ERISA provides a "series of express causes of action in favor of participants, beneficiaries and fiduciaries"); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.) (Congress intended to provide uniform remedies in the enforcement of ERISA), *cert. denied*, 454 U.S. 968 (1981); *Ogden* v. *Michigan Bell Telephone Co.*, 571 F. Supp. 520, 523 (E.D. Mich. 1983) (following *Dependahl*); *Gordon* v. *Matthew Bender & Co.*, 562 F. Supp. 1286, 1293-94 (N.D. Ill. 1983) (court accepts expansive view of ERISA).

The legislative history also supports this conclusion. Both the Senate and House Reports, in the sections considering the enforcement provisions of ERISA, indicate that Congress intended "to provide the full range of legal and equitable remedies." H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4655; S. Rep. No. 93-127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871. Further, both reports stress the broad preemption of state laws to provide a uniform source of law. H.R. Rep. No. 93-533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4655; S. Rep. No. 93-127, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4871.

Allowing a fiduciary to bring a state law cause of action for retaliatory discharge, as in the present case,

will create inconsistency in the enforcement of ERISA. Initially, since all states do not recognize such an action,[10] the recourse for a terminated ERISA fiduciary will depend upon the fortuity of the location of his employment. Moreover, even in the states which do recognize an action in a fiduciary's favor, the state courts will have to define both the scope of a fiduciary's duties under ERISA and the available remedies. Clearly, allowing the remedies available to an ERISA fiduciary discharged for complying with ERISA to turn upon the state of his employment and a state court's interpretation of ERISA's provisions runs contrary to Congress' desire to establish a uniform federal law regulating pension plans. *E.g.*, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, __, 103 S. Ct. 2890, 2904 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). Thus, we conclude that permitting a fiduciary to bring a state law cause of action for discharge in violation of public policy would thwart the purpose of Congress in enacting ERISA. *E.g.*, *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, Authier's action is preempted.[11]

In summary, we conclude that, as applied in this case, the Michigan common-law cause of action for discharge in violation of public policy relates to ERISA and, therefore, is expressly preempted. Since permitting a fiduciary to bring this type of action would create a diversity in the enforcement of ERISA, we believe that it is contrary to Congress' desire to create a uniform federal law

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[10] *See generally* Annot., 12 A.L.R. 4th 544, 555 (1982 & Supp. 1984).

[11] The district court held that a cause of action could not be implied from ERISA in favor of fiduciaries discharged for fulfilling their statutory duties. Since the appellee failed to raise this issue on appeal, we make no determination as to the correctness of this holding.

governing the enforcement of ERISA. The jury verdict is, accordingly, vacated and the case remanded with instructions to dismiss appellee's complaint.

Both sides shall bear their own costs of this appeal.

EDWARDS, Senior Circuit Judge, concurring in part and dissenting in part.

This appeal poses many problems but I am not persuaded that the jury award should be vacated. Plaintiff pled and presented evidence to support a claim that he was wrongfully discharged for seeking to uphold his fiduciary duties under ERISA. In my opinion, plaintiff stated a cause of action under Michigan law for wrongful discharge in violation of public policy. The following cases illustrate Michigan's stated policy in this regard. I recognize that it has been more often stated in dicta than illustrated in judgments. Nonetheless, the facts in this case as viewed by this jury fit the Michigan theory and I see no reason to doubt that Michigan would protect the integrity of ERISA as part of its own public policy. *See Suchodolski* v. *Michigan Consolidated Gas Co.*, 412 Mich. 692, 316 N.W.2d 710 (1982); *Trombetta* v. *Detroit, Toledo & Ironton Railroad Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978) and *Sventko* v. *Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

I should add that I do not think ERISA preempted the Michigan cause of action spelled out above. ERISA does not expressly create a federal cause of action for wrongful discharge of a fiduciary.

While, if I were not writing in dissent, I would give serious thought to defendants' remittitur motion, I do not join in vacation of the entire jury award.

APPENDIX B

TRIAL JUDGE'S DECISION*

(United States District Court —
Eastern District of Michigan)

* * *

[86] * * * This case was originated when the Plaintiff Emery Authier, Jr. filed a complaint in the Wayne County, Michigan Circuit Court on February 23, 1981. In that complaint he alleged that the Defendant Ginsberg, along with the Corporate Defendants had breached an employment contract, and they individually and collectively wrongfully terminated his employment at the American Steel Corporation.

Plaintiff also alleges that the Defendants, in discharging him, violated both Michigan and Federal public policy.

The Plaintiff also contends that the Defendants conspired to breach his employment contract.

Subsequent to that time, the case was removed to this Court when the Defendants asserted that the issue involved a Federal question and that this Court had no jurisdiction.

The Defendants thereupon filed answers to the complaint which, in essence, denied the substantive allegations of the Plaintiff's complaint and affirmatively asserted that the Plaintiff, among other things, had failed to state a cause of action [87] upon which relief could be granted.

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* Judge's Decision on Defendants' Motion for Directed Verdict, March 8, 1983.

The affirmative actions were tested at a later time by the Defendants who filed pretrial motions for summary judgment. The motions were denied by the Court without prejudice.

On February 16, 1983 a Jury was selected to hear the issues, with the exception of the claim by the Plaintiff relating to ERISA. The parties by stipulation have agreed that the Court, sitting as the trier of fact, would resolve that contested issue.

At the conclusion of the — strike that.

During the trial the Plaintiff produced nine witnesses, many of whom appeared by means of deposition, two of whom are family members and presented evidence in support of damages which allegedly stemmed from the unlawful discharge.

The two principal witnesses who are produced by the Plaintiff were Fred M. Ginsberg, one of the named Defendants, and Emery Authier, Jr., the Plaintiff in this cause.

Essentially the Plaintiff asserted and testified that during all times that are relevant to these proceedings, he was the controller of the American Steel Corporation. His testimony indicated [88] that he began his employment with American Steel in 1968, that he assumed a variety of roles and responsibilities with American Steel, including a directorship and the appointment to the position of Assistant Secretary and Vice-President of Finance of American.

More importantly as it relates to this cause, the Plaintiff assumed the responsibility as a co-administrator of the pension plan that had been adopted by American. He shared this responsibility with two other persons, both of whom were stationed in Pittsburgh Pennsylvania.

It should be noted that the Plaintiff was at all times located in Detroit, Michigan.

Authier contends that in his role as a co-administrator for the pension plan, that he was terminated because of his insistence that he, Authier, comply with the Federal laws which governed pension plan administrators.

He further contends that Defendant Ginsberg, in his capacity as the controller — strike that — as the Chairman of American Steel Corporation, issued directives to him — to wit, Authier — which would require him, Authier, to violate the Federal statutes. Authier claims that [89] when he was placed in the horns of a dilemma — namely, compliance with Federal statute which contained both civil and criminal liabilities on one hand and the compliance with the directive of a superior on the other hand, that he chose the former.

He contends that notwithstanding his protestations, that Mr. Ginsberg, after consulting the matter with other persons who were within the National Steel framework — to wit, Messrs. Doerr, McBride and Barton — that he, Ginsberg, terminated Authier's employment contract, an employment contract which Authier claimed to have been a lifetime contract.

The Defendants in their motions for dismissal essentially argue that an examination of the Plaintiff's proofs reveal that there is no cause of action stated by the Plaintiff and that they individually and collectively should be relieved of any further responsibility to the Plaintiff in this matter.

The — there is no issue with regard to Count 1. The only — strike that.

The Plaintiff, by virtue of a prior stipulation, does not make the claim of breach of [90] contract against the individual Defendant Fred M. Ginsberg. The Corporate Defendants concede, for the purposes of their motion for dismissal, that there does exist a sufficiency of evi-

dence in the record to justify its presentation to the Jury. Thus, the Court must examine and reach conclusions regarding Counts 2 and 3 of the complaint.

The Plaintiff argues that the case revolves around an October 6, 1980 letter that was transmitted to T. J. Rudd, Assistant Vice-President for Industrial Relations. This was a letter that was dexed to Mr. Rudd with copies to Mr. Angevine and Mr. Rust; the latter two names being the co-administrators in the profit sharing plan. It is alleged that a copy of this letter was disseminated to Fred M. Ginsberg.

It should be noted that there is evidence that Mr. Ginsberg had instructed Mr. Authier to clear any correspondence that emanated from the Authier office.

The October 6, 1980 letter which was — which is Exhibit 51, states in part:

> "It is my recommendation that the following take place:
>
> "1. Thorpe, Reed and Armstrong [91] be the firm to take care of submission to the IRS; if a decision is made to terminate and distribute, Levin, Levin, Garvett and Dill, and salaried employees of American Steel should be notified accordingly as soon as possible.
>
> "2. Form 5310 be prepared at American Steel and all information be verified in detail with the trustee.
>
> "3. Members of the administrative committee and you receive copies of all documents that might be submitted to the IRS for our review in detail.
>
> "4. Members of the committee meet with you to discuss any questions that may have arisen from the review of the documents.
>
> "At this time a decision should be made as to the next step."

Count 2 involves the claim by the Plaintiff regarding an alleged violation of public policy. The cause of action for wrongful discharge in violation of public policy only arises under three circumstances.

[92] One, when there was an explicit legislative enactment which prohibits the discharge or otherwise adverse treatment of an employee who acts in accordance with a statutory right or duty.

Two, discharge arising out of an employee's failure or refusal to violate a law in the course of employment.

Three, implied prohibition when the reason for discharge was the employee's exercise of a right conferred by a well established legislative enactment.

The basis for this recitation is the now often quoted SUCHODOLSKI versus MICHIGAN CONSOLIDATED GAS COMPANY case, found at 412 Michigan 692, a 1982 case.

The Defendants contend in part that the allegations in the complaint and the assertions in the case as presented during the case in chief amount to disputes over management policy of the Corporation.

The Plaintiff, in response, asserts that the evidence indicates that he was discharged because he attempted to carry out his duties as an administrator of the profit sharing plan as required by ERISA, and that he refused to abdicate those [93] responsibilities to other officers of the American Steel and National Steel Corporations.

In examining the evidence which has been presented, it is clear that the acts of which the Plaintiff complains and has presented here do not constitute explicit legislative enactments which would prohibit the discharge and, further, that they do not contain an implied prohibition against the discharge of an employee who exercises a right conferred by a well established legislative enactment.

The Plaintiff concedes that there is nothing within the ERISA statute which prevents the originators of the plan — in this instance, the American Steel — from replacing an administrator or prevents the originator – to wit, American Steel — from discharging the administrator, even though he or she may be fulfilling the duties of that office.

Thus, it would appear that there does not appear to be any claim or any cause of action asserted by the Plaintiff under ERISA.

Defendants also contend that even if the Plaintiff was discharged because he refused to violate the standards and the language of ERISA, he does not state a cause of action for a State law [94] because ERISA preempts any State law which touches upon the enforcement of its provisions. In other words, the Defendants assert that the ERISA plan preempts any State cause of action or any State public policy that may originate from the actions or acts of the Defendants individually and collectively.

In ALESSI versus RAYBESTOS MANHATTAN, INC. 451 U.S. 504, the Supreme Court held that the New Jersey law which expressly prohibited private pension plans from reducing the amount of an employee's benefits by the amount that the worker would receive in Workers' Compensation benefits which was awarded subsequent to retirement was invalid because the statutes were preempted by ERISA.

In passing on this question, the Supreme Court reviewed Title 20 United States Code, Section 1144(a), which states in part:

> "The provisions of this subchapter . . . shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

described in Section 1003(a) of this title and not exempt [95] under Section 1003(b) of this title."

The Court acknowledged that the Workers' Compensation awards were obviously subject to the State's police power, and the law might be viewed as only an indirect intrusion upon the provisions of ERISA. Nevertheless, the Court stated:

> "It is of no moment that New Jersey intrudes, indirectly through a Workers' Compensation law rather than directly, through a statute called "pension regulation.
>
> "ERISA makes clear that even indirect State action bearing on private pensions may encroach on the area of exclusive Federal concern.
>
> "For the purposes of the preemption provision, ERISA defines the term 'State' to include:
>
> "A State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit [96] plans covered by this subchapter. ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision."

In this case the Plaintiff argues that his discharge was a violation of ERISA and, as such, gives rise to a common laws cause of action in Michigan for the wrongful discharge in violation of public policy.

As indicated earlier, the ERISA does not make it unlawful for an employer or originator to remove an administrator of the plan. The appointment of an administrator is within the discretion of the employer of the plan.

The administrator is:

> "The person specifically so designated by the terms of the instruments under which the plan is operated," citing Title 29 United States Code, Section 1002, Subsection 16(a)(1).

Section 2.2 of the profit sharing plan of American Steel expressly provides that the administrator may be removed upon written notice. Thus, a State law which prohibits the removal of an [97] administrator, however laudable, the interest of the State would be in direct contravention of ERISA and would be exempt to apply.

However, in this case the Plaintiff does not contend that he could not be removed as an administrator. He does contend, on the other hand, that he cannot be discharged from his employment because he attempted to fulfill the obligations of that office, and that such obligations were placed upon him by Federal law.

As such, in the opinion of this Court, Michigan does have a legitimate interest in protecting its citizens from being discharged from employment when that discharge is in retaliation of the performance of duties required by State or Federal law. Such a cause of action is totally outside the scope of ERISA and, thus, it does not preempt the State's interest in this respect.

In ALESSI, the New Jersey Act touched upon the benefits payable to a retiree by reason of the Workers' Compensation benefit which was awarded subsequent to retirement.

In passing on the issue, the Supreme Court expressly stated:

> "We need not determine the outer [98] bounds of ERISA's preempted language to find the New Jersey provision an impermissible intrusion on the Federal regulatory scheme."

This Court notes that the Supreme Court expressly left intact the lower Court's opinion which interpreted the meaning of ERISA's preemptive language. The Court suggests that reference be made to Note 21 at page of the ERISA — strike that — of the ALESSI decision.

In particular, the Supreme Court let stand the 2nd Circuit's opinion in AMERICAN TELEPHONE AND TELEGRAPH versus MARY, 592 F 2d at page 118. There the 2nd Circuit held that a garnishment order for delinquent support payments which were issued by the State against the Defendant's pension benefits was valid, notwithstanding ERISA's preemptive language and the proscription and alienation found in 29 United States Code, Section 1046(b)(1).

In AT&T, the Court reasoned that the implied exception was consistent with Congress' concern for the well-being of employees and their dependents and that it is also consistent with the Federal policy of enforcing, quote, support obligations and establishing praternity under the [99] 1974 social services amendments to the Social Security Act, end of quote.

Thus, the Supreme Court's holding in ALESSI addressed only the specific issue before it and does not, in the opinion of this Court, stand for the proposition that all State law which, quote, relates to any employee benefit plan, end of quote, is preempted by ERISA .

Now, it should be noted here that the action in the present cause, in the case at bar, does not relate to benefit rights as did the statue in ALESSI. Therefore, this Court must now examine the nature of the cause of action in this case as relates to ERISA to determine the common law of Michigan — strike that — to determine whether or not common law of Michigan is preempted

by the Federal legislative scheme which is pronounced and set forth in ERISA.

In RICE versus SANTE FE, 331 United States 218 — and reading from page 230 the Court said:

> "The question in each case is what the purpose of Congress was."
>
> "State action must give way if the act of Congress fairly interpreted is in actual conflict with the law of the [100] State,"

that quote coming from HINES versus DAVIDOWITZ, 312 U.S. at page 67.

Thus, the State law may not stand if it is, one, inconsistent with the Federal scheme or, two, if it conflicts with the objectives of Federal law.

In order to discern the purpose of ERISA, it is important that we look to and examine the legislative intent of the Act. According to 3 United States Code, Congressional and Administrative News at page 4639:

> "The primary purpose of ERISA is the protection of individual pension benefits."
>
> The Act is designed to:
>
> "(1) establish equitable standards of plan administration;
>
> "(2) mandate minimum standards of plan design with respect to vesting of plan benefits;
>
> "(3) require minimum standards of fiscal responsibility by requiring an amortization of unfunded liabilities;
>
> "(4) insure the vested portion [101] of the unfunded liabilities against the risk of premature plan termination; and
>
> "(5) Promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits."

Those standards being found at page 4640 of 3 United States Code, Congressional and Administrative News.

It is clear to this Court from a reading of these pronouncements that the primary purpose of ERISA is the protection of participants and the protection of the beneficiaries of the plan. To this end, any State law which touches upon the assets of the retirement plan or the administration thereof could not stand.

Here the Plaintiff's cause of action sounds in breach of contract. It is fundamental that the State, through the development of its common law and through its legislative enactments may proscribe the rights and duties of the parties in the area of contract tort and property, except insofar as they conflict with those enumerated [102] powers of Congress as found in Article I, Section 8 of the United States Constitution or by the Constitution, itself.

Michigan Courts have held that within every employment contract, there is an implied prohibition that employees otherwise terminable at will may not be terminated where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment.

The Plaintiff contends that he was discharged because he refused to violate a Federal law. Michigan's prohibition does not, in the judgment of this Court, conflict with ERISA. The cause of action here does not affect any right conferred by ERISA. It does not affect the management, investment or the distribution of any assets in the profit sharing plan. Moreover, it does not prevent or mandate any action by the employer or sponsor in relationship to the plan.

The cause of action here falls totally outside of the legislative scheme of ERISA. Thus, a cause of action

based on public policy and founded in ERISA is not preempted by the Act.

We now next attempt to determine whether [103] the Michigan Courts have in fact sanctioned a cause of action based on a Federal statute rather than a State statute.

This Court, sitting in a diversity action, must apply the law of the State of Michigan. The precise question here presented has not been addressed by the Michigan Courts. Thus, this Court must decide what Michigan Courts would do if they had been presented with this issue.

There is nothing in the reading of SUCHODOLSKI to suggest that a cause of action could not be founded on a Federal law.

This Court also notes that, in passing upon the question which was addressed in SUCHODOLSKI, the Supreme Court noted that in one case where public policy was addressed to Federal law rather than State law, reference is made to Note 3, McNULTY versus BORDEN, INC., 474 F Supp at page 1111.

Thus, this Court can see no reason why the interests of the State are any less compelling were the causes of action based on Federal rather than State law. Therefore, this Court believes that, in viewing the evidence in its most favorable light, that the Plaintiff has stated a cause of action [104] which is founded on Michigan public policy.

The Plaintiff also contends that the alleged acts of the Defendants amount to a violation of Federal public policy. The Defendants individually and collectively contend that the Plaintiff's exclusive remedy in this regard is found in the provisions of ERISA and that there is no Federal common law on the subject.

In TEXAS INDUSTRIES versus RADCLIFF, 451 U.S. at page 630, the Supreme Court adhered to its earlier pronouncements that generally there is no Federal common law. There are of course narrowly drawn exceptions.

> "One, those cases in which a Federal Rule of decision is necessary to protect uniquely Federal interests.
>
> "Two, those interests in which Congress has given the Courts the power to develop substantive law."

Clearly, the Plaintiff's cause of action does not fall in the first exception. There is no unique Federal interest presented in the Plaintiff's claim that he was wrongfully discharged because he did something or he failed to do something that the law required.

[105] Thus, the Plaintiff's claim must fall, if at all, within the second category.

In this regard, the Supreme Court stated at that point:

> "Presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme, including an integrated system of procedures for enforcement."

That being found at page 645 of the TEXAS INDUSTRIES versus RADCLIFF case.

There can be no doubt that ERISA is a comprehensive legislative scheme. The statue goes into great detail in describing the rights and duties of participants, sponsors, beneficiaries and fiduciaries. The statute also grants broad powers to the Secretary of Labor to formulate regulations and to oversee the enforcement of the Act.

In addition, the Act contains specific enforcement provisions. In view of this, the Court cannot and will not imply an additional cause of action based upon the policy of ERISA. The policy of ERISA, is adequately protected by [106] the enforcement provisions which are contained in the Act.

Finally, this Court notes that the Plaintiff has not stated a cause of action under ERISA, itself. The enforcement provisions apply to administrators, beneficiaries, participants and/or the Secretary of Labor. Here, the Plaintiff does not claim that he has been denied any benefit. Moreover, he does not claim nor does he allege that the assets of the profit sharing plan have been mismanaged. He merely claims that he should not have been discharged from his position as the Controller and Vice-President of American Steel.

Such claim, in the opinion of the Court, is outside the scope of ERISA, as well as its enforcement provisions.

Thus, with regard to Count 2, the Court believes that the motions for dismissal of Count 2 as to the Michigan public policy shall be denied. The motion for dismissal as to Count 2 as it relates to Federal public policy shall be granted.

With regard to Count 3 — namely, conspiracy — the Plaintiff asserts in his testimony that Mssrs. Doerr, McBride, Barton and Ginsberg conspired to terminate his employment. The [107] Defendants collectively and individually assert that a corporation and its employees and agents do not constitute the two or more persons who are required for civil conspiracy.

A civil conspiracy is:

> "A combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means to the injury of another."

The Defendants also contend that the — that:

> "An actionable civil conspiracy cannot exist between a parent corporation and its wholly owned or controlled subsidiary. The mere formality of separate

corporate entities within a single organization, without more, is insufficient to prove the capability for conspiracy."

The evidence indicates that the Defendant American Steel Corporation is a Michigan corporation, the Defendant National Steel [108] Corporation is a corporation which is foreign to the state of Michigan. Moreover, there is evidence that National Steel owns 100 percent of the stock of American Steel; that the Boards of Directors of the two Defendant Corporations contain Directors who are interchanging or overlapping; specifically, Mssrs. Angevine and Love.

There is also evidence that — strike that.

There is also evidence that the Plaintiff had dual reporting responsibilities; one to Mr. Ginsberg and one to certain other designated officers at Great Lakes Steel and/or National Steel.

There is evidence that Defendant Ginsberg had reporting responsibilities as Chairman of American to National Steel. There is also evidence that National Steel appointed the President of American Steel, Mr. McBride, who is, according to my notes, also President of Great Lakes Steel.

Finally, there is evidence that both Plaintiff Authier and Defendant Ginsberg received their — received their salaries during all times that are relevant to these proceedings from National Steel.

We believe that there is sufficient [109] control between the two Corporate Defendants to warrant the conclusion that these two corporate entities are, for purposes of this trial and for the claim which has been placed against them — to wit, conspiracy — are one. Therefore, this Court believes that the Corporate Defendants' motion for dismissal as to Count 3 shall be granted.

The individual Defendant Ginsberg's motion for dismissal under Count 3 shall be denied.

In summary, the Court makes the following conclusions:

One, Count 1 remains for resolution by the trier of facts.

Two, Count 2, as relates to Michigan public policy remains for resolution by the trier of fact.

Three, Count 2 as relates to Federal public policy shall be and is dismissed.

Four, Count 3 as it relates to the Corporate Defendants shall be and is dismissed.

Five, Count 3 as it relates to Defendant Ginsberg remains for resolution by the trier of fact.

Six, there is no cause of action presented during the Plaintiff's case in chief which would [110] suggest or indicate that there exists under the facts presented a cause of action under ERISA.

I believe the Court has now completed its determination of the issues.

* * *